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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TROY DYER, Defendant and Appellant.	B207908 (Los Angeles County Super. Ct. No. BA280285)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark V. Mooney, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Troy Dyer (appellant) of two counts of willful, deliberate, and premeditated attempted murder of a peace officer (counts 1 & 2; Pen. Code, §§ 664, subds. (e)-(f), 187, subd. (a)),[1] one count of possession of a firearm by a felon (count 3; § 12021, subd. (a)(1)), and two counts of assault on a peace officer with a semiautomatic weapon (counts 4 & 5; § 245, subd. (d)(2)).[2] As to each count, the jury found true allegations that appellant personally used and intentionally discharged a firearm (§ 12022.53, subds. (b) & (c)), and that appellant committed the underlying offenses for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(A)).

The trial court imposed a sentence of 70 years to life in state prison calculated as follows: on count 1, the trial court imposed a term of 15 years to life, plus an additional 20 years for the discharge of a firearm; on count 2, the trial court imposed a consecutive term of 15 years to life, plus an additional 20 years for the discharge of a firearm; on count 3, the trial court imposed a concurrent term of seven years; on counts 4 and 5, the trial court stayed punishment pursuant to section 654. The trial court ordered appellant to pay various fines and awarded him 1,130 days of actual custody credit and 170 days of conduct credit, for a total of 1,300 days of presentence credit.

Appellant contends the following on appeal: (1) the trial court deprived appellant of his constitutional rights to a fair trial, due process, and confrontation when it denied his *Pitchess*[3] motion; (2) he received ineffective assistance of counsel because defense

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1 All further statutory references are to the Penal Code unless otherwise specified.

2 The district attorney charged a codefendant, Brandon Dixon, with the premeditated attempted murder counts and the assault on a peace officer counts. Dixon pled guilty to these charges during trial and is not a party to this appeal.

3 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535 (*Pitchess*).

counsel did not move to sever his case from Dixon's case or request an Evidence Code section 402 hearing to determine the scope of questions Dixon's counsel could ask during voir dire and at trial; and (3) the trial court deprived appellant of his constitutional rights to a fair trial, due process, and confrontation when it did not declare a mistrial after Dixon's opening statement. We affirm the judgment.

FACTS

I. The Prosecution

On March 13, 2005, around 11:00 p.m., Los Angeles Police Department (LAPD) Officers Joseph Meyer and Christopher Wren were patrolling territory claimed by the "Rollin 40s" gang when they saw a green Hyundai with two occupants run a stop sign. As the officers were following the Hyundai, the driver skipped over a curb as he was making a right turn. Believing that the driver was possibly under the influence, the officers activated the police vehicle's light and siren to pull him over. The driver began to speed up and the officers followed while calling for backup. Both vehicles were travelling southbound on Vermont Avenue.

When the officers were approximately three car lengths behind the Hyundai, they saw the passenger in the Hyundai lean his entire torso out of the window and position himself to sit on top of the open window sill. The passenger fired three to six shots directly at the officers. At trial, Officer Meyer identified appellant as the shooter with "a hundred percent certainty." Likewise at trial, Officer Wren testified that he was "100 percent" certain that appellant was the shooter.

As appellant shot at the officers, Officer Wren, the driver of the police car, slowed down and veered into a lane of oncoming traffic in order to avoid the shots. Officer Meyer radioed to dispatch: "Southbound Vermont. Passenger is firing . . . Shots fired, we're passing [] southbound on Vermont, passing Gage." Officer Meyer went on to tell dispatch that the shooter was wearing a "light-colored" sweatshirt. Seconds later, when Officer Wren had maneuvered the police car back into safety, appellant fired at the officers again. During this second round of shooting, Officer Meyer recalled at least one

shot and Officer Wren recalled three to five shots. The officers surmised that appellant was shooting at them with a semiautomatic assault rifle based on the rapid shots and the manner in which appellant held the weapon. The vehicular pursuit continued through southwest Los Angeles, and, at one point, the Hyundai turned off its headlights and the officers were forced to follow the vehicle based on the brake lights. At no point during the vehicular pursuit did either officer see anyone leave the vehicle or any weapon tossed from the vehicle.

When the Hyundai was in territory claimed by the Hoovers Crips gang, it stopped, and appellant and the driver exited the vehicle and began running.[4] At trial, Officers Meyer and Wren identified Dixon, appellant's codefendant, as the driver of the vehicle. Officers Meyer and Wren stopped the police vehicle and pursued appellant and Dixon on foot. According to Officer Wren, appellant was running in a way that lead him to think that appellant was carrying a weapon, or some other item, inside his pants. The officers followed appellant and Dixon to a chain-link fence eight feet high. Dixon scaled the fence first. As appellant was scaling the fence, his pants fell to his ankles and his cell phone dropped to the ground.[5] Appellant made it over the fence, pulled his pants up and kept running.

The officers scaled the fence, as well, and continued pursuing appellant and Dixon until they encountered another fence, this one topped with iron spikes. Appellant and Dixon scaled the second fence. Officers Meyer and Wren did not follow and instead began setting up a perimeter with additional police units that had responded to the officers' calls for backup. At this point, a police airship, manned by LAPD Officers

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4 At the time, the Hoovers Crips and Rollin 40s gangs were in an ongoing feud with each other.

5 Officers later recovered the cell phone and made a list of each entry and the corresponding telephone number. The telephone number for the entry M-O-M matched the home number for appellant's mother.

Michael Rodriguez and Jack Schonely, was shining its spotlight on the immediate vicinity. From the helicopter, the officers, who had observed part of the vehicle chase, as well as the foot pursuit, saw appellant and Dixon run in opposite directions after scaling the second fence. Officer Schonely testified that he saw appellant run into the rear area of a house where a yellow car was parked.

In the early morning hours of March 14, 2005, LAPD officers and canine units found appellant hiding inside the trunk of the yellow car and arrested him. Detective Brian Carr was the arresting officer and read appellant his *Miranda*[6] rights. When he was arrested, appellant was wearing a gray T-shirt, jeans, and a single shoe. An officer recovered appellant's other shoe in an alley nearby. At a field showup, Officers Meyer and Wren identified appellant as the person who shot at them from the Hyundai.[7] Officers Rodriguez and Schonely also identified appellant at a field showup as the person they saw exiting the Hyundai from the passenger side door and running from Officers Meyer and Wren.

LAPD officers searched the Hyundai and found no ammunition or firearms inside. Officers found three fired cartridges and three live rounds on Vermont Avenue in the vicinity of where the shootings took place. All of the items were from the same manufacturer and bore the same "GFL" brand. Moreover, all three fired cartridges were fired from the same weapon. The casings and live rounds were compatible with a Tek-9 semiautomatic assault rifle.

LAPD criminalist Kevin Hollomon tested appellant's and Dixon's hands for gunshot residue. He did not find residue on either individual's hand. Hollomon testified that given the pursuit after the shots were fired and the multiple opportunities for the

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6 *Miranda v. Arizona* (1966) 384 U.S. 436.

7 Officers found Dixon hiding in a crawl space underneath a house and arrested him shortly before they arrested appellant. At a field showup, Officers Meyer and Wren identified him as the driver.

shooter to wipe his hands after the shooting, "it [would be] very, very difficult to find gunshot residue on a person's hand." Hollomon testified it was his laboratory's policy not to test vehicles or clothing for gunshot residue. LAPD forensic print specialist Jose Lainez testified that a latent fingerprint found on the passenger side window of the Hyundai matched appellant's left ring finger "100 percent."

LAPD Officer Carlos Gonzalez testified as the prosecution's gang expert. Officer Gonzalez testified that appellant was a member of the Seven Four Hoover gang, that the gang's primary activities included murders, attempted murders, and drive-by shootings, and that appellant's act of shooting at two police officers benefitted the gang because it enhanced the gang's visibility and reputation.

II. The Defense

No evidence was presented on behalf of the defense.

DISCUSSION

I. *Pitchess* Motion

A. Summary of Proceedings Below

Appellant made a pretrial *Pitchess* motion seeking broad discovery of the personnel records of Officers Meyer and Wren.[8] In support of the motion, defense counsel filed a declaration in which he averred that: "The credibility of the arresting

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[8] In addition to these records, appellant requested the names, addresses, and telephone numbers of all persons who filed complaints against the officers and persons interviewed during the investigation of said complaints; all statements, written or oral, made during the investigations of said complaints; all reports, recordings, notes, and memoranda made pursuant to the investigation of said complaints; the names and assignments of all individuals conducting the investigations of said complaints; all test records, reports, and statements, including all oral conversations of psychiatrists, psychologists, and fellow officers, pertaining to Officers Wren and Meyer's propensity to engage in conduct subject to said complaints; all documents that record disciplinary action commenced or imposed against Officers Wren and Meyer, all statements made by officers involved in the instant case to Internal Affairs, and all exculpatory evidence within the meaning of *Brady v. Maryland* (1963) 373 U.S. 83, 87.

officer is the entirety of the case against the defendant. I am informed and believe that the arrest did not occur as the officer wrote in the arrest report and the officer fabricated the arrest report." The declaration went on to state that appellant "never possessed a firearm nor fired a firearm on March 13, 2005, at Officers C. Wren and J. Meyers" and "that the officers did not recover a firearm nor was there gunshot residue on the hands or clothing of [appellant]."

At the hearing on the *Pitches*s motion, defense counsel elaborated on the motion, stating: "Our position is there was never any gun in that vehicle. A gun was never fired out of that vehicle, that there is no evidence that a gun was ever fired out of that vehicle, that the statements of the officers are not true that a gun was fired out of the vehicle." The trial court denied the *Pitchess* motion, stating that even though a "low standard" governed a showing of good cause, "I don't think there's been the factual showing made."

B. Appellant's Contention

Appellant contends the trial court deprived him of his constitutional rights to a fair trial, due process, and confrontation when it denied his *Pitchess* motion without conducting an in camera review of the requested documents.

C. Relevant Authority

In *Pitchess*, the California Supreme Court held that a criminal defendant is entitled to discover an officer's personnel records if the information contained in them is relevant to his ability to defend against the charge. (*Pitchess, supra,* 11 Cal.3d at p. 535.) To obtain disclosure of police personnel records, a defendant must submit affidavits establishing "good cause." (Evid. Code, § 1043, subd. (b)(3); *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019 (*Warrick*).) Good cause exists when the defendant demonstrates (1) materiality of the requested material to the subject matter of the pending action, and (2) a reasonable belief the agency has the type of information sought. (Evid. Code, § 1043, subd. (b)(3); *Warrick, supra,* at pp. 1016, 1019.)

To show that the requested information is material, a defendant is required to "establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events." (*Warrick, supra*, 35 Cal.4th at p. 1021.) A showing of materiality requires the defendant to set forth a """specific factual scenario""" of officer misconduct applicable to his or her case that establishes a """plausible factual foundation""" and articulates a valid theory of admissibility for the information sought. (*Id*. at pp. 1019, 1025.) A "plausible scenario of officer misconduct is one that might or could have occurred." (*Id*. at p. 1026.) Mere relevance to credibility, however, is insufficient to warrant disclosure, without a showing of good cause. (See *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1023-1024.) To permit discovery of any generally relevant matter in a peace officer's personnel file would effectively destroy the protection provided to those files by Evidence Code sections 1043 through 1045. (*California Highway Patrol v. Superior Court, supra,* at pp. 1023-1024.)

We review a trial court's ruling on a *Pitchess* motion for abuse of discretion. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221.) That discretion is broad. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827.)

D. Analysis

The trial court did not abuse its discretion by denying appellant's *Pitchess* motion. Although demonstrating good cause is subject to a relatively low threshold (*Warrick, supra*, 35 Cal.4th at p. 1019), appellant's motion did not meet this requirement.

People v. Thompson (2006) 141 Cal.App.4th 1312 (*Thompson*) is instructive. In that case, the defendant was arrested after he sold cocaine to an undercover police officer. Uniformed officers who were not part of the undercover operation searched the defendant and found two $5 bills, which were later identified as the bills the undercover officer gave to the defendant for the cocaine. (*Id*. at p. 1315.) Attached to defendant's *Pitchess* motion was a declaration from defense counsel in which counsel averred that defendant

did not sell drugs to the undercover officer and was not carrying two $5 bills when he was arrested. (*Thompson*, *supra,* at p. 1317.) The declaration accused the officers of fabricating the events altogether to avoid liability for their own behavior. (*Ibid*.)

The Court of Appeal affirmed the trial court's denial of the defendant's *Pitches*s motion without an in camera review, because the defendant "[did] not present a factual account of the scope of the alleged police misconduct, and [did] not explain his own actions in a manner that adequately support[ed] his defense." (*Thompson*, *supra,* 141 Cal.App.4th at p. 1317.) Specifically, the court pointed out that defendant "[did] not state a nonculpable explanation for his presence in an area where drugs were being sold, sufficiently present a factual basis for being singled out by the police, or assert any 'mishandling of the situation' prior to his detention and arrest." (*Ibid*.) The "declaration simply denied the elements of the offense charged," which was simply insufficient to meet the standard for an in camera review. (*Ibid*.) The *Thompson* court pointed out that even though *Warrick* defined "'plausible'" as what might or could have occurred, it did not deprive trial courts of the ability "to apply common sense in determining what is plausible, and to make determinations based on a reasonable and realistic assessment of the facts and allegations." (*Thompson*, *supra,* at p. 1319.)

Like the declaration in *Thompson*, the declaration in this case utterly failed to present a factual account of the scope of the alleged police misconduct and explain appellant's own actions in a manner that adequately supported his defense of mistaken identity and that the officers fabricated the shooting altogether. Specifically, appellant did not explain whether he was in the Hyundai in the first place, why he was in the area where the foot pursuit took place, why he was hiding inside a car when canine units located him, and why he was singled out by Officers Meyer, Wren, Rodriguez, and Schonely during the field showups. Moreover, the declaration fails to explain the scope of the alleged police misconduct insofar as it provides no clue as to whether Officers Meyer and Wren were the only ones allegedly to fabricate the shooting and frame appellant, or whether Officers Rodriguez, Schonely, the investigating detectives, the

canine units, the officers who recovered appellant's other shoe, the fired cartridges, and live rounds, and the dispatch operator were also involved.

For those reasons, we conclude the trial court did not abuse its discretion by denying appellant's *Pitchess* motion without first conducting an in camera review.

II. Ineffective Assistance of Counsel

A. Appellant's Contention

Appellant contends he received ineffective assistance of counsel because defense counsel: (1) did not move to sever his trial from codefendant Dixon's trial, and (2) did not request an Evidence Code section 402 hearing to determine the scope of questions Dixon's counsel could ask at voir dire and at trial.

B. Relevant Authority

Appellant has the burden of proving the claim of ineffective assistance of trial counsel and must show that counsel "failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates." (*People v. Pope* (1979) 23 Cal.3d 412, 425.) Appellant must also establish that he was prejudiced by his attorney's inadequate performance, i.e., that there is a reasonable probability that he would have obtained a more favorable judgment but for his attorney's errors, or that the attorney's acts or omissions resulted in the withdrawal of a potentially meritorious defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 691-696; *In re Lucas* (2004) 33 Cal.4th 682, 721.) We keep in mind, nonetheless, that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 369-370, fn. omitted.)

Moreover, the absence of an objection generally reflects a matter of trial tactics about which a reviewing court, blessed with judicial hindsight, will not second-guess defense counsel. (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) Courts have also deferentially acknowledged that "'[e]ven the best criminal defense attorneys would not defend a particular client in the same way.'" (*People v. Duncan* (1991) 53 Cal.3d 955,

966.) It is not enough to allege that an attorney's tactics were poor or that the case might have been handled differently; the defendant must "'affirmatively show that the omissions of defense counsel involved a crucial issue, and that the omissions cannot be explained on the basis of any knowledgeable choice of tactics.'" (*People v. Jackson* (1980) 28 Cal.3d 264, 289.)

C. Analysis—Motion to Sever

Where, as here, multiple defendants are jointly charged with a felony offense, their cases "must be tried jointly, unless the court order[s] separate trials." (§ 1098.) Section 1098 demonstrates the Legislature's "preference for joint trials." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1296 (*Carasi*).) "However, separate trials *may* be ordered in the face of antagonistic defenses. . . . [S]uch conflict exists only where the acceptance of one party's defense precludes the other party's acquittal." (*Ibid*.) In other words, a joint trial is prohibited only where "'the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both [defendants] are guilty.'" (*People v. Hardy (*1992) 2 Cal.4th 86, 168.) "When, however, there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 41.) "We review the denial of severance for abuse of discretion—a deferential standard based on the facts as they appeared when the ruling was made." (*Carasi, supra,* 44 Cal.4th at p. 1296.)

We conclude that if defense counsel had moved to sever appellant's case from Dixon's case before the start of trial, the trial court would likely have denied the motion given the sufficiency of independent evidence against appellant. During the preliminary hearing, Officer Wren testified that he had the opportunity to see clearly the shooter's face and positively identified appellant as the person who shot at him. Thus, even if defense counsel had moved to sever Dixon's case from appellant's case on the ground that the two men would present conflicting defenses, Officer Wren's testimony, was

certainly sufficient independent evidence of appellant's guilt for the trial court to deny severance.

Because it was unlikely that the trial court would have granted severance, defense counsel's failure to seek severance does not amount to ineffective assistance of counsel.

Assuming for argument, however, that there was ineffective assistance of counsel, appellant has failed to establish that it is reasonably probable that he would have obtained a more favorable judgment but for his attorney's alleged error. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 691-696.) There was overwhelming evidence of appellant's guilt in this case. At trial, Officer Meyer identified appellant as the passenger-side shooter with "a hundred percent certainty." Likewise, Officer Wren testified that he was "100 percent" certain that appellant was the shooter. Appellant was also seen fleeing from the officers and running into the rear of a house with a yellow car and then was subsequently arrested hiding inside the car's trunk. Finally, appellant's fingerprint was found on the passenger side of the Hyundai. In short, the victims' unequivocal testimony that appellant was the shooter, evidence of appellant's flight from the officers, and forensic evidence linking appellant to the car that the officers pursued rendered any error by counsel in not seeking severance harmless.

D. Analysis—Evidence Code Section 402 Hearing

Appellant argues that defense counsel should have known that Dixon would present a defense that conflicted with appellant's own "mistaken identity" defense, and thus "at a minimum, [should have] requested a hearing pursuant to [E]vidence [C]ode section 402, to determine what questions Dixon's defense counsel would be permitted to ask on voir dire and what she would be permitted to say in her opening statement." Had defense counsel done so, appellant maintains, the trial court "could then have determined whether severance or separate juries was appropriate." After the jury's verdict, defense counsel filed a declaration in which he averred that it was a "mistake" for him not to have requested a section 402 hearing.

We need not determine whether the failure to request an Evidence Code section 402 hearing amounted to ineffective assistance of counsel because even if it did, such error was harmless. Assuming counsel had requested an Evidence Code section 402 hearing, and assuming the trial court elected to sever Dixon's trial from appellant's trial based on that hearing, it is not reasonably probable defendant would have received a more favorable judgment at trial given the overwhelming evidence, as discussed above, of appellant's guilt.

III. Motion for Mistrial

A. Appellant's Contention

Appellant contends the trial court deprived appellant of his constitutional rights to a fair trial, due process, and confrontation when it denied his motion for mistrial, which he made after Dixon's opening statement.

B. Relevant Authority

"A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial." (*People v. Bolden* (2002) 29 Cal.4th 515, 555; *People v. Silva* (2001) 25 Cal.4th 345, 372.) "It is not an abuse of discretion when a trial court denies a motion for mistrial after being satisfied that no injustice has resulted or will result from the occurrences of which complaint is made." (*People v. Eckstrom* (1986) 187 Cal.App.3d 323, 330; *People v. Wallace* (2008) 44 Cal.4th 1032, 1084 ["'the trial court is vested with considerable discretion in ruling on mistrial motions'"].)

C. Analysis

During Dixon's opening statement, Dixon's counsel represented to the jury that the evidence would show that Dixon had learning disabilities, was not involved in gangs, and had no knowledge that Dyer was carrying an assault weapon on the night of March 13, 2005, or that Dyer would shoot at the police officers. In short, counsel painted

a picture of Dyer as the shooter and Dixon as the innocent driver caught up in an unfortunate situation. Appellant's counsel did not present an opening statement.

During the first break outside the presence of the jury, appellant argued that Dixon's opening statement indicated Dixon would testify and, thus, if Dixon did not intend to testify, the trial court should declare a mistrial. The trial court denied the motion, noting that it was premature and stating: "I didn't understand counsel's opening to [indicate] that [Dixon] was going to be testifying." After the second day of trial, Dixon pled guilty to the charges filed against him and did not appear on the third day of trial. Appellant renewed his motion for mistrial, arguing that the jury would assume Dixon pled guilty from his absence at trial, thereby implicating appellant. The trial court denied the motion, stating: "[t]he court believes that the instructions that the court will give the jury will be curative [of] any prejudicial effect that will be towards [appellant]."

On appeal, appellant argues: (1) "the court effectively allowed Dixon's counsel to testify on behalf of her client that he had no knowledge that when appellant got into the car he had a gun" and (2) "[w]hen Dixon left the trial, the jury must have assumed he somehow took responsibility for his crimes or worse yet that he had been exonerated of wrongdoing because of his mental state and now only appellant was fighting his conviction."

We conclude the trial court did not abuse its broad discretion by denying appellant's motion for mistrial. As a threshold matter, we have reviewed Dixon's opening statement and we agree with the trial court's assessment that Dixon's counsel did not indicate that Dixon would testify. Rather, she indicated that several educational psychologists would testify to Dixon's severe learning disabilities and inability to formulate consequences and abstract thoughts, and that their testimony would explain why Dixon did not know appellant would bring an assault weapon in the car and why he did not stop fleeing once the officers began to pursue him.

Furthermore, appellant's "chances of receiving a fair trial [were not] irreparably damaged" (*People v. Bolden*, *supra*, 29 Cal.4th at p. 555) by the opening statement

because the trial court instructed the jury that statements by counsel should not be considered evidence. Prior to opening statements, the trial court specifically instructed the jury: "Now the opening statement is not evidence. Remember I said earlier what the attorneys say is not evidence. That particularly applies to the opening statement. It's merely a statement by the attorneys of what they believe the evidence will show." After a brief instruction on the nature of how evidence is presented at trial, the court again instructed the jury: "[W]e have to remind you that the statement is only what the attorneys think is going to happen or believe is going to happen at trial."

We must """'assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citations.]'""" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148-1149.) "We can, of course, do nothing else. The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions." (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) Thus, any prejudice stemming from Dixon's opening statement was effectively cured by the trial court's instruction. (*People v. Hinton* (2006) 37 Cal.4th 839, 863 [prosecutor's references to inadmissible hearsay during opening statement did not warrant mistrial because trial court's instruction that attorney's statements were not evidence "dispelled any prejudice"].)

We likewise reject appellant's contention that he was entitled to a mistrial after Dixon pled guilty and did not appear at trial. At the time Dixon pled guilty, no evidence had been introduced that was solely admissible against Dixon. Furthermore, appellant's speculation that the jury "must have assumed [Dixon] somehow took responsibility for his crimes or worse yet that he had been exonerated of wrongdoing" is not persuasive. After Dixon did not appear on the third day of trial, the trial court specifically instructed the jury: "And you will note that Mr. Dixon and his attorney, Ms. Holtz, are not present. They are no longer a part of this litigation. I am instructing you that you are not to speculate as to the reasons for that and not to let the fact they are no longer part of this litigation enter into your deliberations in any way."

As stated above, we must "'"'"assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given'"'" (*People v. Guerra*, *supra*, 37 Cal.4th at pp. 1148-1149) and "[w]e can, of course, do nothing else" (*People v. Mickey*, *supra*, 54 Cal.3d at p. 689, fn. 17). Thus, we must assume that the jurors follow the trial court's instruction and did not speculate about Dixon's absence or allow the absence to enter into its deliberations. (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1084 [defendant not entitled to mistrial where prejudice is curable by admonition or instruction].)

Finally, we summarily reject appellant's somewhat baffling argument that the trial court denied him his Sixth Amendment right to confront Dixon. The trial court did not admit any out-of-court statements made by Dixon during trial, and Dixon did not testify against appellant. Because Dixon was not a witness against appellant, appellant's confrontation right was not implicated. (*Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527, 2531 [6th Amend. provides the accused with a right "to be confronted with the witnesses against him"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.

BOREN

We concur:

_____, J.

DOI TODD

_____, J.

ASHMANN-GERST